

SABAH FINANCE BERHAD

a

v.

ADDSPEED ENTERPRISES SDN. BHD. & 3 ORS.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU

DATO' SULEIMAN BIN HASHIM J

[CIVIL SUIT NO. K. 22-124 OF 1993]

b

13 MAY 1995

PRACTICE & PROCEDURE: *Application to strike out defence - Rules of the High Court 1980, O. 18 r. 19 - Hire purchase claim - Defendants rescinding hire purchase agreement - Defendants returning machinery to plaintiff - Returned machinery in poor condition - Defendants alleging machinery defective - Plaintiff claiming outstanding sum due on hire purchase agreement - Whether plaintiff entitled to rely on exception clause in hire purchase agreement - Whether defendants have a bona fide defence to the claim.*

c

The first defendant purchased various machinery from the plaintiff under 7 hire purchase agreements. The other defendants signed indemnity and undertaking agreements with the plaintiff in return for the plaintiff entering into the hire purchase agreement with the first defendant. The first defendant purported to rescind the hire purchase agreements on the grounds that the machines were not to fit for the purposes for which it was manufactured.

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The plaintiff's claimed that when the machines were returned to them they were discovered to be in poor condition and certain parts had been dismantled and removed. The plaintiff therefore sought the balance of the sum outstanding due under the hire purchase agreement.

e

In their application to strike out the defence of the defendants the plaintiff sought to rely on the exception clause in the hire purchase agreement.

Held:

[1] The defendants, by their letter marked as exhibit "WLS9" confirmed that they had checked the component parts and that there would be no difficulties with the future availability of spare parts. Furthermore the defendants confirmed in the said letter that they were fully aware of the new model and the service of the vehicles. The defendants cannot approbate and reprobate and in the circumstances the defences filed were scandalous, frivolous and/or vexatious.

f

[2] On the evidence in its totality there has been an absence of conflict of material evidence of conflict of affidavits on material points so as to enable the Court to reach the conclusion that the defendants' defence was bound to fail. This was especially so as it was clear that the plaintiff could avail itself of the exception clause, i.e. clause 8, in the hire purchase agreements.

g

[Plaintiff's application to strike out defence allowed with costs].

Cases referred to:

h

Dorothy Kwong Chan [1969] 2 MLJ 68 (refd)

Karsales (Harrow) Ltd. [1956] 1 WLR 936 (dist)

J.P. Berthelsen [1987] 1 MLJ 134 SC (cit)

Raja Zainal Abidin [1993] 2 SCR 650 SC (foll)

Legislation referred to:

Rules of High Court 1980, O. 18, r. 19(1), (a), (b), (c), (d)

i

- a* For the plaintiffs - Kartina Sulong
For the defendants - Rakkir Singh (Collin Gooting with him)

JUDGMENT

Suleiman bin Hashim J:

- b* This is plaintiffs' application that the defence of all four defendants be struck out, O. 18, r. 19(1)(a),(b),(c) and (d) Rules of High Court 1980, dated 28 January 1994.

At the outset Counsel for plaintiffs conceded that it was open for the Court to decide whether or not O. 18, r. 19(1)(a) was applicable, an issue raised by Counsel for defendants.

- c* By seven hire purchase agreements, all in identical terms, one is dated 18 May 1991, four are dated 11 December 1991 and two are dated 2 May 1992 made between plaintiffs and 1st defendants, and with 2nd, 3rd and 4th defendants entering into seven indemnity and undertaking agreements, all in identical terms, executed on the same dates as the hire purchase agreements were executed whereby 2nd, 3rd and 4th defendants agreed to indemnify plaintiffs against any loss resulting from or arising out of the said hire purchase agreements or any breach or non-observance by 1st defendants and to pay to plaintiffs the amount of such loss, plaintiffs let to 1st defendants on hire-purchase as averred in paragraph 3 of plaintiffs' re-amended amended writ, one excavator, four Linghe Dump Trucks and two Linghe Tipper Trucks, registration numbers and other particulars of the seven units as stated therein.

- d* The seven suits Nos. K.134/1995 to K.140/1995 consolidated with this application are where 1st defendants in this application are plaintiffs and plaintiffs in this application are defendants and where 1st defendants as plaintiffs claimed rescission of the hire purchase agreements, loss, damages including special damages, the mainstay of the claim being that the seven units were not "fit for the purposes for which it was manufactured", "and that the fundamental defect goes to the root of the said agreement", with particulars of defects and breakdowns more particularly as in paragraphs 7 of both the amended statement of claim and the affidavit-in-reply to the application, that within six (6) months from the purchase of the said units and within the warranty period, with each unit:

- e* (a) The body of the said vehicle had rusted to such an extent that the doors and the other parts had fallen off;
- f* (b) The transmission speed gearbox had broken down;
- g* (c) The clutch, clutch housing, clutch bearing, clutch pump and clutch pressure plate had broken down;
- (d) The differential gear had broken down;
- (e) The axle shaft left and right had broken down;
- (f) The air pump, master air pump and valve had broken down;
- h* (g) The jack, air valve for the jack had broken down.

Plaintiffs in this application went on to say, as in paragraph 8 of the affidavit-in-support and more particularly as in paragraphs 6 to 10 of the re-amended amended writ:

- i* 6. By a letter dated 8 July 1992, the 1st defendant, through their solicitors purported to terminate the said agreements by giving 7 days' notice of the 1st defendants' intention to terminate;

7. The said goods were surrendered to the plaintiffs on or around 7 August 1992. The said goods were discovered to be in poor condition and certain parts had been dismantled and removed. The said goods remain unsold as of this date hereof;
8. By reason of the matters aforesaid, the plaintiffs suffered loss and damage;
9. Pursuant to the said agreements and the said undertakings the plaintiffs, through their solicitors, did demand from the 1st, 2nd, 3rd and 4th defendants, personally as well as through their solicitors M/s Collin Goonting & Co., that the dismantled parts be returned to the plaintiffs and further demanded the payment of the sums outstanding and due under each of the said agreements;
10. Despite repeated demands from the plaintiffs and their solicitors, all the defendants failed, refused and/or neglected to return the dismantled parts or to pay the loan outstanding payable under the agreements as particularised as below or any part thereof. The following sums remain due and owing as at 14 June 1993.

The plaintiffs quantified the total amount at RM422,365.41 and also claim interest and costs.

As regards the “dismantled parts” defendants’ contention is as in paragraphs 7 and 11 of the statement of defence:

7. The defendants are in possession of broken parts which were removed from the said vehicles and is kept, by the defendants as evidence of defects;

XXXXX

XXXXX

XXXXX

XXXXX

11. Paragraph 9 is admitted and the defendants aver that the dismantled parts are parts which are in fact broken and cannot be used for the purposes for which it was manufactured.

Defendants did aver that they purchased the seven units from Chong Hin Hoi (trading as M/s Hoi Yen Trading Co.) P.O. Box No. 123, 87008 Labuan F.T. (hereinafter referred to as “the dealer”) and that the dealer was plaintiffs’ agent.

With respect I agree with the submission of Counsel for defendants that the dealer was plaintiffs' agent, as was held in *Dorothy Kwong Chan's* case [1969] 2 MLJ 68, tendered by Counsel for defendants.

The issue is are plaintiffs liable for the defects, breakdowns in/of the seven units, if at all, as alleged by defendants.

A similarity, the common denominator between *Dorothy Kwong Chan's* case, the case of *Karsales (Harrow) Ltd.* [1956] 1 WLR 936 Court of Appeal, also tendered by Counsel for defendants and the present application before me is that in each three is an exception clause:

- (1) in *Dorothy Kwong Chan* Clause 1(iv):

The owner gives no warranty whatsoever in respect of the vehicle as to description fitness roadworthiness repair or otherwise, nor shall the owner be responsible for any delay in delivery.

- (2) In *Karsales (Harrow) Ltd.*, Clause 3(g):

No condition or warranty that the vehicle is roadworthy, or as to its age, condition or fitness for any purpose is given by the owner or implied herein.

- (3) in the present application before me Clause 8:

- a* No warranty whatsoever is given by the owner as to the age state or quality of the goods or as to fitness for any purpose and any implied warranties and conditions are also hereby expressly excluded.

In *Dorothy Kwong Chan* where the finance company bought a car from the dealers and let it on hire-purchase to the appellant, facts similar as in the present application before me, Raja Azlan Shah J, as he then was, said:

- b* It is clear from the decided cases that in a hire-purchase agreement in respect of an ordinary motor car for normal use on the road there are, subject to any express terms as to state of repair, condition, and so forth, two stipulations to be implied: (1) that the vehicle hired corresponds with the description, that is, the lender must lend that which he contracts to lend and not something which is essentially different - and this is a fundamental term which cannot be excluded by an exception clause, so that any breach of that term automatically gives the hirer a right to terminate the contract if he so wishes and "sue for damages generally, or, at his option, to affirm the contract and treat it as subsisting and sue only for damages; (2) that the vehicle is as fit for the purpose for which it is hired as reasonable care and skill can make it. The obligation is in the nature of a warranty, breach of which entitles the hirer to a claim for damages only; it is not a condition which goes to the root of the contract a breach of which gives the hirer at once and without reference to the facts and circumstances a right to repudiate the whole contract. However, in certain circumstances the hirer is entitled to treat the contract as at an end. See the example illustrated by Upjohn LJ in *Astley Industrial Trust Ltd. v. Grimley* (3) in the final analysis the existence and extent of this second stipulation must inevitably depend on the facts and circumstances of the individual case. There is no unqualified implied obligation of fitness. Liability for breach of this obligation may be negated by an exception clause.
- c*
- d*
- e* I turn then to apply these propositions of law to the facts of this case. The vehicle was delivered to the appellant with a defective axle, but the learned president has fully analysed the facts and has shown how on these facts it is impossible to treat the finance company as being in breach of the fundamental term which I have mentioned above. The appellant accepted the vehicle which was contracted for and used it for about three months, running it for about 2,091 miles. On those facts I agree with the Court below, and that matter therefore passes from consideration.
- f* On the second implied stipulation (of fitness) it can be said that the appellant might originally have had some claim for damages against the finance company for the defective condition in which he found the vehicle but for the fact that in clause 1(iv) of the agreement the finance company excluded liability so, in my opinion, they lawfully could. The defect, as found by the learned president (with whose finding I agree) was not so serious as to constitute breach of a fundamental term, so that the exception clause applied in favour of the finance company. Even on the facts of the case, there is no breach of the implied stipulation (of fitness).
- g*

And it was held in *Dorothy Kwong Chan* based on the facts of the case that while the dealers were the agents of the finance company not only were the finance company not liable but the finance company were entitled to damages.

- h* In *Dorothy Kwong Chan* the car was delivered to the appellant with a defective axle, yet on the facts of the case "was not so serious as to constitute breach of a fundamental term, so that the exception clause applied in favour of the finance company."

And His Lordship went further to say "Even on the facts of the case, there is no breach of the implied stipulation (of fitness)."

- i* In the present application before me, defendants terminated or purportedly terminated the seven agreements on 8 July 1992, about four months after the execution of the hire-

purchase agreements/hire-purchase indemnity and undertaking agreements, the last of which was executed on 2 March 1992 which I think would mean that defendants had had the use of the units for about four months compared to the use of the car for about three months in *Dorothy Kwong Chan* and furthermore a *fortiori* on 5 September 1991 defendants by their letter to plaintiffs, exhibit 'WLS9' to plaintiffs' affidavit-in-support, confirmed "It is further confirmed that the aforesaid component parts were checked by my mechanic and myself and we hereby ensure your company that there will not be any difficulties in the future availability of spare parts. Furthermore, we are fully aware of this new model and the service of the vehicles." Defendants thus admitted they were "fully aware of this new model and the service of the vehicles".

Defendants affidavit-in-reply is admission, is silent on 'WLS9'. I attach herewith a photostat copy of the letter 'WLS9' dated 5 September 1991 as Appendix 'A'.

With respect defendants cannot approbate and reprobate.

With respect under the circumstances I do find defendants defence and in the suits K.134/1995 to K.140/1995 consolidated with this application where defendants are plaintiffs the claim in respect of the units referred to in 'WLS9', Appendix 'A', 'scandalous, frivolous or vexatious", O. 18, r. 19(1)(b).

In *Karsales (Harrow) Ltd.*, a garage owner was shown a car which was in excellent condition, it was in excellent condition, and the garage owner wished to buy it. The plaintiff firm bought the car from the seller and sold it to a finance company and the garage owner entered into a hire-purchase agreement with the finance company and after the contract forms had been signed and exchanged the seller brought the car to the garage owner's premises at night but the alert garage owner on inspection of the car found what was a car in excellent condition was now a car in a deplorable state, it had been towed to his premises, parts were missing, new parts had been replaced by old and the engine was so defective that the car would not go. The cost of putting it into its original condition was estimated at 150 pounds. He refused to accept it and thereafter made no payments under the agreement.

And Lord Denning, LJ had no hesitation to say:

that the plaintiffs could not rely on the exceptions clause, since under this hire-purchase agreement the delivery of the car in such condition that it would not go was a breach of a fundamental term going to the root of the contract... the lender under this agreement was under an implied obligation to deliver the car in substantially the same condition as it was in when it was first inspected by the hirer and to keep it pending delivery in suitable order and repair for the purposes of the bailment... it is now settled that exception clauses of this kind no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract...

With respect, the facts in the present application before me is not in any way congruent with the facts in *Karsales (Harrow) Ltd.* In the present application before me is not a case from an "excellent condition" to "a deplorable state", delivery at night or after dark or under cover of darkness or in stealth or in any manner or any conduct surreptitious or any "misconduct" on the part of plaintiffs or any "cover for misconduct" on the part of plaintiffs. Indeed defendants inspected the units referred to in 'WLS9', Appendix 'A'.

a Thus in *Dorothy Kwong Chan* based on the facts of the case the party concerned could avail itself of the exception clause whereas in *Karsales (Harrow) Ltd.*, based on the facts of the case the party concerned could not avail itself of the exception clause.

b With respect, I think the facts in *Karsales (Harrow) Ltd.* and the facts of the case in the present application before me are if I may use the phrase in *J.P. Berthelsen* [1987] 1 MLJ 134 SC “poles apart”. The facts in the present application before me are not that any of the units were in a “deplorable state” at the time of delivery, there was no complain by defendants as to the state of any of the units at the time of the delivery, indeed defendants had inspected six of the units, Appendix ‘A’. And as was cautioned in *Berthelsen* of “the inherent perils blind reference to authority enshrouds when resorted to without a proper appreciation of the vital considerations involved in the decision in question ...”

c With respect I think in the present application before me based on the facts before me, as was the case in *Dorothy Kwong Chan*, the plaintiffs can avail itself of the exception clause, i.e. clause 8 of the hire purchase agreements and really this is an application where is applicable as stated in *Raja Zainal Abidin* [1993] 2 SCR 650 SC:

d We must emphasize that for any Court to reach such similar decision on an application under O. 18 r. 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

e With respect, in the present application before me on the evidence as a whole, in its totality there “have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail...”. In respect of the units referred to in ‘WLS9’, Appendix ‘A’, i.e. in respect of the four Linghe Dump Trucks and the two Linghe Tipper Trucks, total of only six as ‘WLS9’, Appendix ‘A’, refers only to “Linghe” units.

f I grant order in terms of plaintiffs’ application dated 28 January 1994 under O. 18, r. 19(1)(b),(c) and (d) in respect of the six units referred to in ‘WLS9’, Appendix ‘A’, with costs, i.e. the defence of 1st, 2nd, 3rd and 4th defendants be struck out under O. 18, r. 19(1)(b),(c) and (d) in respect of the six units referred to in ‘WLS9’, Appendix ‘A’, with costs.

g The matter of the excavator shall go for full trial.

Appendix ‘A’

“WLS9”

Addspeed Enterprises Sendirian Berhad

No. 82, Kg. Pantai, Jalan Kubong, Tel. No. 413604

Postal Address: W.D.T. No. 11, 87009 W.P. Labuan

h

Your Ref:

Our Ref:

5 September 1991

i

The Manager
Sabah Finance Bhd.
Labuan FT

a

Dear Sir

China Made Lorries - Linghe

b

This letter refers to the verbal conversation between your goodself and the undersigned in your office yesterday afternoon at 5.20 p.m.

Please be informed that the component parts of the China Made lorries which our company intended to buy are made of the followings:

Engine : Mitsubishi LG12

c

Body : Isuzu

Gear Box : Isuzu

Hoist: : Nissan Tipper

d

It is further confirmed that the aforesaid component parts were checked by my mechanic and myself and we hereby ensure your company that there will not be any difficulties in the future availability of spare parts.

Furthermore, we are fully aware of this new model and the service of the vehicles.

Thanking you for the kindest concern.

Yours faithfully

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(sgd):

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